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Ang Sue Khoon v Majlis Bandaraya Pulau Pinang

B PLANNING APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/PP/5 OF 2015
YEO YANG POH CH, TAN CHONG MENG AND MALKIT SINGH
6 FEBRUARY 2016

C *Local Government — Town Planning — Planning permission — Appeal against grant of planning permission — Part heard by board — Recusal application — Planning applicant filed recusal application against all three members of panel — Grounds of bias and prejudgment — Whether planning applicant could make recusal application when it was not party to appeal* D *— Whether board had power to make directions — Whether planning applicant could refuse to comply with directions — Whether directions reasonable*

Klassik Tropika Development Sdn Bhd ('KTD') had purchased a piece of land in Pulau Pinang ('the land') that had a double storey detached house on it ('the E old building'). On 3 August 2010, KTD demolished the old building on the land without obtaining the requisite planning permission. The demolition was unlawful and KTD was fined RM6,000. Pursuant to s 27(2)(a) of the Town and Country Planning Act 1976 ('the Act'), the Majlis Bandaraya Pulau Pinang ('the respondent') issued a notice to restore or reinstate the old building ('the F rebuild order') on KTD. Instead of complying with the rebuild order, KTD submitted an application for planning permission to develop two blocks of luxurious condominiums on the land ('the proposed project'). The respondent approved the planning application, subject to conditions. Upon discovering that the planning application was successful, the owner of a neighbouring piece G of land, Ang Sue Khoon ('the appellant'), filed her present appeal to the Planning Appeals Board ('the board') against the respondent for its grant of the planning permission. Although KTD was not a party named in the present appeal and nine similar appeals by owners of other neighbouring lands regarding the proposed project, the board had at all relevant times given KTD, H as the planning applicant and affected party, full opportunity to be heard. At the hearing before the board, KTD called as its first witness its planning manager, a person having no personal knowledge of matters, which occurred at the relevant times. This witness had also not read any company documents from which she could have derived some indirect knowledge. When KTD I came to realise its mistake, it requested that no weight be given to the testimony of this witness and also requested an adjournment. The board granted both requests. However, KTD then filed a recusal application against all three members of the panel. The affidavit in support of the recusal application was affirmed by someone who was not present at the hearing. In its recusal

application, KTD alleged bias and prejudgment on the part of all three members of the board during the board's proceedings. The board then directed KTD to submit two things at the recusal hearing, namely the notes taken by KTD during the board's proceedings and photocopied pages of the detailed notes of proceedings that KTD requested to be checked, with the parts of be checked duly identified ('the board's directions'). KTD had not complied with the board's directions and on the date of the recusal hearing KTD submitted that the board had no power to make such directions and that the board's directions were plainly wrong.

Held:

(1) Although KTD was not a named party in this appeal, that per se should not be a bar to its making a recusal application, if circumstances warrant the same, as long as it did not abuse the opportunity (see para 23).

(2) The contention by KTD's counsel that there were no provisions for the board to make a direction, in the course of the hearing of an appeal, requiring the production of a document such as KTD's notes was incorrect. The board had the power to make interlocutory decisions, rulings and directions. That power is conferred by statutes, and derived from common law. Policy reasons would lead to the same inevitable conclusion. An adjudicator would not be able to perform his duty, if he had no power to regulate proceedings and to make decisions, rulings and directions when regulating its proceedings. Further, proceedings will turn into a chaos, if a party or its counsel was entitled to choose to obey only those rulings and directions that it agreed with. An interlocutory order, ruling or direction was made for the benefit of the proceeding as a whole and it needed to be complied with. It would bind all parties, as well as the court or tribunal itself. (see paras 61–62, 66, 75, 78–79 & 81).

(3) In its recusal application, KTD had referred to sentences directly quoted from the brief notes of proceedings and KTD's counsel's notes of proceedings as tending to show bias or prejudgment. Of course, these sentences should be taken, read and understood in their proper contexts because context is all important in a recusal application. Thus, KTD ought to have at least exhibited its counsel's notes during the board's proceedings in the affidavit supporting the alleged bias or prejudgment it made reference to in its recusal application. If an applicant or deponent did not disclose the source of information, its application should simply be dismissed. However, that would not be the most appropriate thing to do in a recusal application because in such an application allegations are not made against another party but against the judge or adjudicator. Thus, the first direction for the production of KTD's notes was necessary in that those notes would aid the tribunal to construe bias or

prejudgment. Similarly, the second direction was likewise clearly reasonable and desirable (see paras 35–39 & 71–73).

(4) A judicial review of the board's decision was always available to the parties after the conclusion of the hearing of an appeal and after a final, substantive decision of the board had been reached. Interlocutory judicial reviews were normally not permissible (see paras 65–66).

[Bahasa Malaysia summary

Klassik Tropika Development Sdn Bhd ('KTD') telah membeli sebidang tanah di Pulau Pinang ('tanah tersebut') di mana rumah berkembar dua tingkat terletak di atasnya ('bangunan lama'). Pada 3 Ogos 2010, KTD merobohkan bangunan lama atas tanah tersebut tanpa memperolehi kebenaran perancangan yang diperlukan. Perobohan tersebut adalah tak sah dan KTD didenda sebanyak RM6,000. Mengikut s 27(2)(a) Akta Perancangan Bandar dan Desa 1976 ('Akta'), Majlis Bandaraya Pulau Pinang ('responden') mengeluarkan notis untuk memulihkan atau mengembalikan bangunan lama ('perintah membina semula') ke atas KTD. KTD sepatutnya memenuhi perintah membina semula tersebut, tetapi sebaliknya memasukkan permohonan untuk kebenaran perancangan untuk membina dua blok pangsapuri mewah di atas tanah tersebut ('projek yang dicadangkan'). Responden meluluskan permohonan perancangan, tertakluk kepada syarat-syarat. Selepas mendapati yang permohonan perancangan tersebut berjaya, pemilik tanah bersebelahan, Ang Sue Khoon ('perayu'), memfailkan rayuannya kepada Lembaga Rayuan Perancangan ('lembaga') terhadap responden kerana kebenarannya terhadap keizinan perancangan. Walaupun KTD bukan pihak yang dinamakan di dalam rayuan ini dan sembilan rayuan yang sama oleh pemilik-pemilik tanah bersebelahan yang lain berkenaan projek yang dicadangkan, lembaga telah pada kesemua masa yang relevan memberi kepada KTD, sebagai pemohon perancangan dan pihak yang terjejas, peluang penuh untuk didengar. Pada masa pendengaran di hadapan lembaga, KTD memanggil saksi pertamanya pengurus perancangan, orang yang tidak mempunyai pengetahuan peribadi mengenai perkara tersebut, yang berlaku pada masa relevan tersebut. Saksi ini juga tidak membaca apa-apa dokumen syarikat daripada mana dia dapat memperolehi pengetahuan tak langsung. Apabila KTD menyedari kesilapannya, ia memohon bahawa tiada berat diberikan kepada keterangan saksi ini dan juga memohon untuk penangguhan. Lembaga membenarkan kedua-dua permohonan. Walau bagaimanapun, KTD kemudiannya memfailkan permohonan menarik diri terhadap ketiga-tiga ahli panel tersebut. Afidavit sokongan menarik diri tersebut telah disahkan oleh seseorang yang tidak hadir pada masa pendengaran. Di dalam permohonan menarik dirinya, KTD mendakwa berat sebelah dan pra-penghakiman ke atas ketiga-tiga ahli lembaga tersebut semasa prosiding lembaga. Lembaga kemudiannya mengarah KTD untuk memasukkan dua perkara dipendengaran menarik diri, iaitu nota-nota yang

diambil oleh KTD semasa prosiding lembaga dan muka surat-muka surat salinan foto nota prosiding terperinci yang dipohon oleh KTD diperiksa, dengan bahagian yang diperiksa sewajarnya dikenalpasti ('arahan-arahan lembaga'). KTD tidak mematuhi arahan-arahan lembaga dan pada tarikh pendengaran menarik diri, KTD berhujah bahawa lembaga tidak mempunyai kuasa untuk membuat arahan-arahan sedemikian dan arahan-arahan lembaga jelas salah.

Diputuskan:

(1) Walaupun KTD bukan pihak yang dinamakan dalam rayuan ini, ini sendirinya tidak patut menjadi halangan kepadanya dalam membuat permohonan menarik diri, jika keadaan mewajarkannya, selagi ia tidak menyalahgunakan peluang tersebut (lihat perenggan 23).

(2) Hujahan oleh peguam KTD bahawa tidak terdapat peruntukan untuk lembaga membuat arahan, dalam pendengaran rayuan ini, mengkehendaki pengemukaan dokumen seperti nota-nota KTD adalah tidak betul. Lembaga mempunyai kuasa untuk membuat keputusan interlokutori, peraturan-peraturan dan arahan-arahan. Kuasa itu diberikan oleh statut, dan berasal daripada *common law*. Alasan polisi akan membawa kepada kesimpulan yang tidak dapat dielakkan. Hakim tidak akan dapat menjalankan tugasnya, jika beliau tidak mempunyai kuasa untuk mengawal prosiding dan membuat keputusan, peraturan-peraturan dan arahan-arahan semasa mengatur prosidingnya. Selanjutnya, prosiding akan bertukar menjadi huru-hara, jika pihak atau peguamnya berhak memilih untuk mengikut hanya kepada peraturan-peraturan dan arahan-arahan yang ia bersetuju dengannya. Perintah interlokutori, peraturan atau arahan dibuat untuk faedah prosiding keseluruhannya dan ia perlu dipatuhi. Ia akan mengikat kesemua pihak, dan juga mahkamah atau tribunal itu sendiri (lihat perenggan 61–62, 66, 75, 78–79 & 81).

(3) Dalam permohonan menarik dirinya, KTD telah merujuk kepada ayat-ayat secara terus dipetik daripada nota ringkas prosiding dan nota prosiding peguam KTD sebagai untuk menunjuk berat sebelah atau pra-penghakiman. Sememangnya, ayat-ayat ini patut diambil, dibaca dan difahami dalam konteks betulnya kerana konteks adalah penting di dalam permohonan menarik diri. Oleh itu, KTD patut mempunyai sekurang-kurangnya mempamirkan nota peguamnya semasa prosiding lembaga dalam afidavit yang menyokong dakwaan berat sebelah atau pra-penghakiman yang dirujuknya dalam permohonan menarik dirinya. Jika pemohon atau deponen tidak mengemukakan punca maklumat, permohonannya patut ditolak. Walau bagaimanapun, ini akan menjadi perkara yang tidak sesuai untuk dilakukan di dalam permohonan menarik diri kerana dalam permohonan sedemikian dakwaan bukan

dibuat terhadap pihak yang lain tetapi terhadap hakim. Oleh itu, arahan pertama untuk pengemukaan nota-nota KTD adalah perlu di mana nota-nota berikut akan membantu tribunal tersebut untuk mentakrif berat sebelah atau pra-penghakiman. Sama juga, arahan kedua adalah jelas munasabah dan wajar (lihat perenggan 35–39 & 71–73).

(4) Semakan kehakiman keputusan lembaga sentiasa tersedia kepada pihak-pihak selepas tamatnya pendengaran rayuan dan selepas keputusan substantif muktamad, lembaga telah dicapai. Semakan kehakiman interlokutori selalunya tidak dibenarkan (lihat perenggan 65–66).]

Notes

For a case on planning permission, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 247.

Cases referred to

Ashmore v Corp of Lloyd's [1992] 2 All ER 486, HL (refd)
Australian Broadcasting Tribunal v Bond and Others (1990) 94 ALR 11, HC (refd)
Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama [1997] 3 MLJ 805; [1997] 4 AMR 4235, CA (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)
Singh Kalpanath, Re [1992] 2 SLR 639, HC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 ss 36(10), (11), 40(1), (2)(c)
Town and Country Planning Act 1976 ss 19(1), 21, 27(2)(a)

Ong Yu Shin (GT Lee with him) (Yu Shin Ong) for the appellant.
Shamiah (Legal Director, City Council of Penang Island) for the respondent.
Adrian Choong (Reza Rahim with him) (Lee Hishammuddin Allen & Gledhill) for the planning applicant, Klassik Tropika Development Sdn Bhd.

Yeo Yang Poh Ch:

ON THE BOARD'S DIRECTIONS

[1] To place these grounds of decision in their context, it is necessary to precede them with a brief narration of the background of this case, its current status, and other relevant matters.

A. BRIEF BACKGROUND

[2] Klassik Tropika Development Sdn Bhd ('the planning applicant') is the present owner of a piece of land measuring about 3.384 acres and held under Lot 951, Sek 13, Bandar George Town, Daerah Timur Laut, Pulau Pinang ('the subject land'). The subject land is located at Lebuhraya Pykett. Its previous owner was Khaw Bian Cheng Sdn Bhd ('the previous owner'). Until 3 August 2010, the subject land had a double-storey detached house on it, bearing postal address No 20, Lebuhraya Pykett, 10400 Pulau Pinang ('the old building'), which was built decades ago.

[3] On 2 November 2009, the planning applicant contracted to buy the subject land from the previous owner. On 3 August 2010, without obtaining the requisite planning permission, the planning applicant demolished the old building entirely. It is not disputed that the demolition is unlawful. Later, the planning applicant pleaded guilty to a charge under s 19(1) of the Town and Country Planning Act 1976 ('the Act'). They were fined a sum of RM6,000. The public prosecutor appealed to the High Court (against sentencing), but withdrew the appeal when it came up for hearing.

[4] Pursuant to s 27(2)(a) of the Act, the respondent issued a notice dated 11 February 2011 ('the rebuild order') to the planning applicant, requiring the planning applicant to restore or reinstate the old building on the subject land. The planning applicant has not complied with the rebuild order, despite the effluxion of a few years. From the evidence presented to the board so far (the hearing of the appeal has not completed yet), the rebuild order has not been withdrawn, revoked or cancelled. The respondent also does not say that the issuance of the rebuild order was a mistake.

[5] While not complying with the rebuild order, the planning applicant on 24 June 2013 proceeded to submit an application for planning permission ('the planning application') to develop two blocks of luxurious condominiums on the subject land ('the proposed project'). This was done some 28 months after the planning applicant had been required by the rebuild order dated 11 February 2011 to restore the old building.

On or about 11 November 2014, the respondent approved the planning application, and granted a planning permission ('the planning permission'), subject to conditions which are not presently of concern to the subject matter of the decision herein.

[6] When the planning application was being considered by the respondent, the appellant came into the picture. She is the owner of Lot 855, Sek 13, DTL, Bandar George Town (bearing the postal address of No 7,

Lorong Pykett, 10400 Pulau Pinang), a 'neighbouring land' as defined under s 21 of the Act. She and several owners of other neighbouring lands had objected to the planning application. Upon being notified that the planning application was successful, she filed her present appeal to this board, against the respondent for its grant of the planning permission. Some owners of other neighbouring lands did likewise. There were, at the start, nine similar appeals to this board regarding the proposed project.

[7] The planning applicant is not a party named in any of these appeals. It is the respondent who has to resist the appeals. But the planning applicant is an affected party, since the outcome of these appeals will affect its interest. Hence, this board has at all relevant times given the planning applicant full opportunity to be heard. The board intends to continue to do so, as long as the planning applicant does not in any way abuse the opportunity it is given to be heard.

[8] After filing her appeal, the appellant made an application for the discovery and production of certain documents. The respondent acceded to the production of most of the documents sought.

[9] After learning that the planning applicant had applied for a 'commencement-of-work' permit, the appellant further filed an application for a stay of the implementation of the planning permission. Her stay-application was joined and supported by several (but not all) of the other appellants in the connected cases. After hearing arguments from all parties on 26 June 2015, I granted a 'partial stay' of the implementation of the planning permission; while allowing the planning applicant to proceed only with earthworks, and at the same time directing that this appeal (and the connected appeals) be heard as expeditiously as possible. When delivering the decision, I gave *ex tempore* brief grounds. I have since also provided the full written grounds for the said decision. The planning applicant has filed an application at the High Court for judicial review of that decision, which is pending.

[10] Meanwhile, after the grant of the 'partial stay', the board immediately fixed this appeal (and the connected appeals) for hearing at the earliest available dates.

B. HEARING OF THE APPEAL

[11] The hearing of the appeal proceeded on the scheduled dates (ie 23 July 2015 and 24 July 2015). To enable a full appreciation of the subject matter of the board's decisions herein, it is necessary to first set out, in some detail, several of the things that transpired during the hearing of the appeal in July (and after that).

[12] The appellant was the first to take the stand on 23 July 2015. She was cross-examined. She completed her testimony. Then the planning applicant called its witness, one Ms Teh Yee Chien ('KMAW1' or 'Ms Teh'), who is the planning manager of the planning applicant. Her witness statement was gone through.

[13] Soon after Ms Teh's cross-examination started, it was discovered that she had only joined the company (the planning applicant) on 1 June 2015, barely two months before she came to give evidence. Yet, in her witness statement, she testifies to matters that happened years before she joined the company, including about what the planning applicant's *position* and *impression* were in the year 2011 (about four years before she joined the company); matters of which she clearly does not have personal knowledge. For example, under question 8A of her witness statement, she says the following, on oath:

> Q8A: Can you inform this Board as to why the KM Applicant did not comply with the matters stated in the Notice dated 11.2.2011?
>
> A8[A]: The KM Applicant did not follow the matters as stated in the Notice dated 11.2.2011 because the KM Applicant took the position and was under the impression that the matter was laid to rest once the appeal to the High Court was withdrawn on 24.8.2011 ...

[14] Her above statement is made matter of factly. She does not say, for instance, that she believes or assumes it to be the position taken, and the impression formed, by the planning applicant in 2011, based on either a documentary source, or because she is told by someone that that was the case.

[15] That, perhaps, could have been due to a careless error, or poor drafting. It was possible that Ms Teh had acquired indirect knowledge of some matters in 2011, from documents of the planning applicant which she had access to and which she had read. Hence, I proceeded to find out whether this was the case.

[16] Unfortunately, the result turned out negative. It appears that Ms Teh does not base her testimony (in question 8A) on any document that she has looked at. She could not tell the board how she (supposedly) came to know what she was stating, under oath, as facts. This can be seen from the following extracts from the notes of proceedings:

> (Note: YYP denotes the Chairman, TYC is Ms Teh, RR is En Reza, MS is Mr Malkit Singh and TCM is Dato' Tan Chong Meng)
>
> YYP: Can you look at your question 8. Your answer to question 8(a). You say that the Applicant did not follow up with the matters as stated in the notice, because the KM Applicant took the position, and was under the impression, that the matter was laid to rest once the appeal to the High Court was withdrawn.

I take the first part first — 'the Applicant took the position'. Which document did you read that gives you this understanding, that the Applicant, meaning the developer company, took the position that you have just described?

TYC: You mean which ...

YYP: Which document, because you were not there at that time. Your knowledge must be based on some documents. So I'm asking you, which document did you read that enables you to make this statement?

TYC: Because there is ... we ... because the notice of 11th February 2011 actually in the end has been withdrawn on 24th August 2011.

YYP: That is not my question, and that is not what is stated in your answer in A8. A8 does not say about withdrawal. You talk about withdrawal (of the notice) somewhere else. We will come to that. A8 says that the Applicant company took the position that the issue surrounding the notice was laid to rest when the appeal to the High Court was withdrawn. Since you have no personal knowledge, you must have read some document that give you the knowledge; from the document that your company took that position. I'm asking, which document did you read? For example, is it a Board of Directors Meeting's Minutes? Is it?

TYC: No.

YYP: Okay, then which documents? Can you tell me?

RR: She doesn't understand the question, Dato' Chairman.

MS: Mr Reza ...

YYP: (En Reza) You can help, but don't suggest an answer.

RR: No, I'm not going to do that.

Do you understand what the Chairman is asking you, Ms Teh? If you don't understand, it's okay, there's nothing to be shy about, you can tell us you don't. Then I will clarify. You don't have to be ... you can be open.

TYC: ...

MS: Where do you get this information from? Simple as that.

RR: What Dato' Chairman is asking you is that, over here the company took a position to say that the notice had been laid to rest once the appeal was withdrawn. Right? You are giving answers based on your record. So, what document did you look at, to know that this was the answer? That is what he is asking. That is a fair explanation, with no suggestions, Dato' Chairman.

YYP: Yes.

RR: Thank you.

TYC: ...

...

YYP: ... What's the source for your saying that the KM applicant, your company, took that position? If you say that: 'I, Ms Teh, is of the view that ...', then I will not ask you this question. But you said that the KM Applicant 'took the position'. So, I want to ask you, from which document did you derive at that conclusion?

TYC: ...

TCM: How do you know? In layman's language.

YYP: Sometimes lawyers are handicapped by the lack of simplicity. Dato' Tan is correct. Just tell us: how do you know that?

TYC: ...

YYP: You have no answer to that? You don't know how to answer?

TYC: No. Actually ... Okay, what I know is like, we have actually been issued ... so far we had been issued a summon, then we paid. After that, a notice came and then we actually appealed to the Board, and then the Board actually withdrawn the notice.

YYP: You are still not answering the question. But never mind, at this stage maybe I want to say this. En Reza, if we carry on, it will embarrass the witness, and I have no wish to do that.

RR: That is so. Thank you, Dato'.

...

YYP: We are here to decide this case on its merits. We're not here to embarrass someone. ...

...

YYP: I think it is very unfair for your employer to send you here today. I think they should send someone else.

(En Reza) Do you want to take a few minutes to decide whether ...

RR: Yes please, Dato' Chairman, if you don't mind. I have made up my mind, and I will put strong words to bring the person in charge also as a witness. But I would like to clarify here, Dato' Chairman, that during the discussion period of preparing the witness statement, it was all pending to say that they were okay from the records. But if the Board feels that the person responsible ought to be here, then take it from me as the counsel that I will make every arrangement necessary for the right person to be here to answer questions. It's not our intention, so to speak, or rather not the intention of the team, to show any disrespect to the Board whatsoever.

MS: It's not merely what we want, En Reza.

RR: I agree.

YYP: In fact, this 'respect for the Board' issue is the smallest of our concern. It is a concern, but it's a small one. What is more important is your case. Secondly, this witness should not be unfairly treated. But if she remains in that chair, I'll have no choice, and Mr Ong has no choice, but to ask her so many questions that she will not know what to say. If you cannot answer where you get the source, the next natural question is: 'did someone tell you to say this?'.

RR: Yes.

YYP: I don't want to go down that road. So, can you consider this, tomorrow morning, inform the Board whether you want to withdraw this witness. However, I must first ask whether the other counsel has any objections.

[17] It became clear to the board, and to all counsel present that afternoon, that Ms Teh's testimony was not going to be helpful to the planning applicant, nor be useful to the board. Apart from probably being able to discredit Ms Teh, and embarrass her somewhat during cross-examination, the appellant too would not gain mileage from her testimony. She was simply not privy to the things that had occurred during the period of time relevant to this case. Her testimony was proving to be unconstructive (to say the least), and was a reflection of the casual and nonchalant approach taken by the planning applicant in putting forward its case. Learned counsel for the planning applicant realised this, judging from what happened next.

[18] It was with the above in mind that I proceeded to discuss with all counsel the possibility of having Ms Teh 'withdrawn' as a witness, if no party objected to the same. In the ensuing discussion, which spilled over to the following day, it was felt that 'withdrawal of a witness' was probably a wrong choice of words. Instead, it ought to be whether the planning applicant was minded to request that no weight be given to Ms Teh's testimony (for the reason that she has no personal knowledge of the facts relevant to this case); and whether the other parties were agreeable to the suggestion. If parties had no objection to that suggestion, it would save Ms Teh and the planning applicant a considerable amount of embarrassment; and also relieve everyone from the agony of having to proceed further with the cross-examination of Ms Teh, when at the end of the day her testimony will have no bearing on the case at hand. I had no doubt that learned counsel for the planning applicant fully appreciated the fact that this suggestion was made for the planning applicant's benefit. He in fact thanked the board, and the other counsel, for the same.

[19] The following morning, after further discussions, the planning applicant put forward the request to disregard Ms Teh's evidence. Parties were agreeable that no weight shall be placed on Ms Teh's testimony; and the board so ruled. Further cross-examination of Ms Teh was no longer necessary. Following from that, the planning applicant also requested an adjournment of the hearing, as it wished to call a second witness, in view of the discarding of Ms Teh's testimony. The planning applicant was prepared to pay the costs of the adjournment.

[20] The adjournment was granted, *to accommodate the planning applicant*; and the date for the continuation of the hearing was set for 29 September 2015. In order to utilise some of the time left vacant (on 24 July 2015) due to the adjournment of the hearing that day, and urged by the board's earlier direction that the hearing of this appeal should be expedited; I proceeded to engage all counsel in a preliminary discussion on some of the issues that had caught the attention of the board thus far. Such an exercise was, in my view, desirable; and helpful in expediting the continuation of the hearing that was to come.

Counsel participated in the discourse, raising no objection to the exercise. In fact, learned counsel for the planning applicant expressed his appreciation for being alerted in advance to some of the issues of concern to the board. That concluded the proceedings on 24 July 2015. The hearing was adjourned to 29 September 2015.

[21] Before the arrival of 29 September 2015, however, things took a new twist. In late August, the planning applicant filed an application to recuse all three members of the panel hearing this appeal ('the recusal application'). The recusal application is supported by an affidavit dated 20 August 2015 ('the recusal affidavit'), affirmed by one William Ow Wui Liong ('Mr Ow'), who described himself as the 'duly appointed representative' of the planning applicant. Later, Mr Ow also filed another affidavit, dated 23 September 2015, in reply to the affidavits of the appellant and of other appellants in the connected cases.

[22] Obviously, the recusal application had to be heard and determined first. So it was scheduled for hearing, on an expedited basis, for the afternoon of 28 September 2015.

C. THE RECUSAL APPLICATION

[23] I have not lost sight of the fact that the planning applicant is not a named party in this appeal (and in the connected appeals). But I do not think that that per se should be a bar to its making a recusal application, if circumstances warrant the same. In my view, such an application should not be brushed aside on technical ground; but should be heard and determined on its merits.

[24] The hearing of the recusal application started as scheduled, on 28 September 2015; and spilled over to the following day (which was a day originally scheduled for the continued hearing of the appeal proper). It could not be concluded, for reasons that will become clear in a while. It was then adjourned to 19 October 2015, to deal with matters concerning notes of proceedings. On 19 October 2015, Mr Adrian Choong appeared for the planning applicant, without En Reza, as the latter could not be present due to a recent family bereavement. Mr Adrian Choong requested for an adjournment, and the next date was fixed for 3 December 2015.

Because the recusal application is pending, I would not go into too much detail about it. However, it is necessary for me to describe or explain some of the matters, in order to provide a sufficient background to the understanding of the subject matter of the decisions that will be reached herein.

C.1 Planning applicant's basis for recusal application

[25] In its recusal application, the planning applicant alleges bias ('real danger of bias') and pre-judgment ('pre-determination') on the part of all three members of the panel hearing this case. According to the planning applicant, its allegations of bias and prejudgment are based on things that were supposedly said during the hearing on three occasions — 26 June 2015, 23 July 2015 and 24 July 2015. Thus, what happened in the proceedings during those three days are most relevant, since they are the *whole basis* upon which the planning applicant seeks to rely, in making the recusal application.

[26] It also means that one is entitled to assume or expect that, *before filing the recusal application*, the planning applicant must already have had in its possession *what it firmly regarded (rightly or wrongly) as sufficient facts and materials to form a proper basis for its application*. If the planning applicant did not think so, then obviously the recusal application ought not to have been filed; as it would have been wrong if it were to do so.

[27] In other words, as far as the planning applicant is concerned, what facts and materials it knew or had at the time of filing the recusal application constitute the *entire* basis for its application. The planning applicant must be prepared to stand or fall by them, and by them alone.

[28] If, subsequent to the planning applicant's filing of its application, another party, or the board, presents or refers to other facts, circumstances, contexts or materials that are relevant to the determination of the application; their relevance will surely *not* be in the form of the planning applicant's basis for its application. Most likely, their relevance or significance will be pointing in the opposite direction.

[29] If in August 2015 the planning applicant did not think it had adequate facts and materials to form a proper basis for a recusal application, or if it had wished to be able to rely on more facts and materials than what it had at that time; were there steps it could and should have taken, or at least attempted, before filing the recusal application? The answer is clearly 'yes'. There were a number of steps available to the planning applicant — *such as*: (a) to request for notes of proceedings from the board; or (b) to request from the other counsel the notes taken by them for the three days of hearing, and to match them with its own notes; or (c) to send its notes to the other counsel, and invite them to confirm the same or point out any errors, inaccuracies or incompleteness.

[30] Unfortunately, apart from requesting for 'a copy of the detailed (stay) Order and written grounds' (as a result of which the brief notes of proceedings for 26 June 2015 were supplied to it by the registrar); the planning applicant had failed to take any of the steps referred to in the preceding paragraph. It also

did not make any other kind of enquiry from the board, or from the other counsel, before it filed the recusal application. That must be taken to mean that the planning applicant was satisfied that what it had in August 2015, *without more*, was in its view enough to ground its recusal application.

[31] So, what materials did the planning applicant have, as at 20 August 2015 when the recusal affidavit was affirmed, from which it stated certain things purportedly in the form of 'facts'? The planning applicant had only two documents. It had the brief notes of proceedings (for 26 June 2015 only) from the board; and it had its own notes of proceedings that its counsel took down during the three days in question ('the planning applicant's notes'). The planning applicant had no other materials.

[32] The materials it had in August 2015 (which were the only materials that could have led the planning applicant to believe that there was a basis for its application) are therefore, without doubt, relevant. That explains why it exhibits the brief notes of proceedings for 26 June 2015 in the recusal affidavit. But the planning applicant's notes are not exhibited or disclosed.

[33] When hearing and, later, determining the merits (or otherwise) of the recusal application; it is obvious that the board is entitled to, and indeed must, look at what is relevant, more so something that is relevant to the very basis of the application itself. This includes the planning applicant's notes. But, as we shall later see, the planning applicant has flatly refused to furnish the same.

C.2 Contexts and the absence of the planning applicant's notes

[34] As alluded to earlier, the planning applicant did, by its solicitors' letter dated 1 July 2015, write to the registrar requesting for 'a copy of the detailed (stay) Order and written grounds'. The registrar provided them with a copy of the brief notes of proceedings of 26 June 2015, which among other things contained the 'partial stay' granted on that day, and the *ex tempore* brief grounds of decision.

[35] In its recusal application, the planning applicant refers to two sentences directly-quoted from the brief notes of proceedings of 26 June 2015 (which it exhibits in the recusal affidavit), as tending to show (in its view) bias or prejudgment. Whether or not the planning applicant is correct in its allegation about the two sentences (and in its other comments) will be an issue for determination in the recusal application in due course; and not for here and now. Of course, one must always bear in mind that those two sentences, like any sentence for that matter, must be taken, read and understood in their proper contexts.

[36] For our present purpose, what is noteworthy about these two references made by the planning applicant is that their contexts can be ascertained from the brief notes of proceedings for 26 June 2015 that has been exhibited. They are not plucked from the air, or left hanging in isolation. If it is felt that the brief notes of proceedings do not sufficiently provide the true or full contexts, then more detailed notes of proceedings (of the pertinent parts) could be sought, if necessary or appropriate.

[37] But the same cannot be said of seven other purported 'direct quotes' which the planning applicant uses in the recusal affidavit to allege the existence of bias or prejudgment — see paras 7, 8, 9, 10, 11, 12 and 14 of the recusal affidavit. They are all short phrases, or short and often incomplete sentences, put (by the deponent) within inverted commas as the exact words that the chairman was supposed to have said on 23 July 2015 or 24 July 2015. Putting aside (for the time being) the question of the accuracy or otherwise of those 'quotes', what is glaringly amiss is that these 'quotes' are all made to stand in unrealistic isolation, without their full contexts being laid out, and without providing any material or document from which a reader might be able to ascertain for himself or herself their proper contexts. Counsel for the planning applicant have confirmed that they took down notes during the proceedings over the three days. There is no doubt that its counsel's notes were the only source from which the planning applicant could have extracted the seven purported 'quotes'. But their notes are not produced or exhibited.

[38] Context is everything. Context is all important, in a recusal application — see *Re Singh Kalpanath* [1992] 2 SLR 639 at p 666.

The mischief, of taking the words of a judge or adjudicator (or of any other person for that matter) out of context, hardly needs introduction. It is both common sense and trite law (particularly in the law on recusal) that what is said must be taken and understood in its full and proper context. That this is so is acknowledged by Mr Ow (the deponent of the recusal affidavit) himself. In fact, Mr Ow went further to give a wider scope to the word 'context', by referring not just to what immediately preceded or succeeded something said on a particular day or occasion, but by including also what had transpired or been said over the entire proceedings:

(Note: YYP denotes the Chairman, WO is Mr Ow and RR is En Reza)

YYP: What is said by someone must be taken in its context?

WO: Yes.

YYP: In the course of one day, everything said on that day must be taken in the context, do you agree?

WO: No.

YYP:	To you, what is meant by 'context'?	A
RR:	I object. That is purely hypothetical and not factual.	
YYP:	Overruled. Context is all important in a recusal application which is based on comments that are alleged to be prejudgement.	
WO:	You ask me what I mean by 'context'. I disagree, because it's over the whole period.	B
YYP:	Oh, the whole 3 days?	
WO:	It's the whole proceedings. (Paragraph) Number 7, it's not only that part.	C
YYP:	Now I understand what you mean.	

[39] The planning applicant did not request for any notes of proceedings of 23 July 2015 or 24 July 2015 to be supplied to it. It also did not seek to collate and match its own notes with the notes taken by the other counsel. Failing both the above, the planning applicant ought to have at least exhibited the planning applicant's notes in the recusal affidavit; the same way that it saw it relevant and necessary to exhibit the brief notes of proceedings for 26 June 2015. The latter provides a context to its two references to those brief notes. The former, if it had been exhibited, might have done likewise for the seven purported 'quotes'. The planning applicant's failure to do so leaves those seven 'quotes' completely out of context.

One could suggest that, if an applicant or deponent does not disclose the source of information, then its application should simply be dismissed. That would be very easy to do. But that, in my view, might not be the most appropriate thing to do, with regard to a recusal application. This is because, in a recusal application, allegations are usually made not against another party, but against the judge or adjudicator. Dismissing such an application in limine, even if on proper grounds, could fuel suspicion on the decision-making process. It is usually better, for everyone involved, to get to the bottom of things and come to a reasoned decision on its merits, when a recusal application is made.

[40] It is no small matter that the deponent of the recusal affidavit, Mr Ow, was not present at the proceedings on any of the three days concerned. He testified that he was only orally briefed by two other representatives of the company, who were (separately) present on those days, but who have not affirmed any affidavit. When his lack of *personal* knowledge was pointed out by the appellant, he did not admit it. He still maintained that 'the contention of the appellants that I do not have personal knowledge of the on goings at the hearing of the appeals above at the appeals board is wholly misconceived in nature' (see para 5 of his affidavit dated 23 September 2015). These matters will no doubt be dealt with in greater detail in the determination of the recusal

application in time to come. The purpose of mentioning them here is to emphasise the point that, for a deponent who was not present at the proceedings and who thus has no personal knowledge of what transpired, it is all the more important and necessary for him to produce and exhibit the planning applicant's notes. His failure to do so ought to be rectified.

C.3 The board's notes of proceedings

[41] The planning appeals board is not a full-time tribunal. It sits, usually, about four or five days in a month. It keeps brief notes of proceedings. It does not prepare or furnish verbatim or detailed notes to the parties. It is not required to do so. It does not have the necessary resources to do so.

[42] Since becoming the chairman of the board, I had taken an *extra* administrative measure to have audio recording of proceedings, though there is no requirement for the same. It is not done in order to have full or verbatim notes prepared for the cases, or to furnish the same (or the recording) to the parties. That would not be feasible, as we do not have the required resources, whether for transcribing, or for checking what is transcribed by others. The audio recording is done solely to have a *backup means of verification* (other than pure reliance on memory), if the occasional need should arise in a particular case, such as in a situation where parties diametrically dispute a *specific* and material part (or parts) of what had in fact transpired during a proceeding. Whether or not this means of verification will be employed in any particular instance is of course a matter of discretion for the board in regulating its proceedings, which it will exercise after taking into consideration all relevant circumstances of the case.

[43] As far as I am aware, this is the first time before this board that a person (and one who is not a named-party) has made a recusal application based on what were *alleged* to have been said during the board's proceedings. In the circumstances, detailed notes of those proceedings would be helpful to the hearing of the recusal application. Thus, I caused detailed notes to be prepared in respect of the three days of hearing. The detailed notes were furnished to all parties on 29 September 2015. I made it clear that, since I did not myself listen to the audio recording, I was not in the position to say whether or not those notes contained any material inaccuracy. If a party, after having gone through the detailed notes, feels that any specific and relevant part might not be accurate, it can request for it to be checked or verified. The board will, after hearing the parties, decide on such a request and, if granted, the method or manner of verification.

[44] Upon being furnished the detailed notes on 29 September 2015, and *even without reading the same*, En Reza Rahim reacted in a strange, combative

and discourteous manner. For example, he *immediately* questioned the 'veracity' (his word) of the notes, and asked if those notes had been 'sanitised' (again his word). As the hearing of the recusal application has yet to be completed, I will not at this stage say too much about En Reza's behaviour, except to provide a brief description sufficient to enable a better understanding of the decisions that will be reached herein.

C.4 Hearing of the recusal application

[45] During the first three days of hearing of the stay-application and of the appeal proper (ie on 26 June 2015, 23 July 2015 and 24 July 2015), I had found En Reza to be courteous, articulate, cooperative, and quick to understand a point (whether made by other counsel or by a panel member). The board's notes of proceedings reflect the attributes I have just described.

[46] Since the start of the hearing of the recusal application on 28 September 2015, however, something strange seemed to have happened. From the word go, on 28 September 2015, En Reza had abandoned his previous demeanours and qualities; and he became progressively hostile, presumptuous, uncooperative, arrogant, and discourteous. It was as if a different counsel altogether was appearing before us; and not the same one who had come in the previous three occasions. The board's notes of proceedings would reflect this drastic change.

[47] In the days of hearing that followed (ie on 29 September 2015 and 3 December 2015), En Reza continued to adorn his 'new' demeanours, with only a few short bursts of reverting to his old self; mostly when he was reminded by a panel member that an abrasive behaviour would do nothing to improve whatever he was trying to argue. It is unfortunate that the 'new' style that he chose to adopt made him an ineffective advocate. Again, for the same reason I have stated earlier, I will not presently venture into too much detail on this matter.

[48] As a result of En Reza's change in demeanour, my learned colleagues and I had to, and did, rise to the challenge of having to consciously separate his discourteous and ineffective advocacy from the merits that may exist in his client's case. We had to constantly bear in mind that (just as in the case of the appellant and the respondent) it is En Reza's client, and not En Reza, who is before us seeking justice in accordance with the facts and the circumstances of the case as a whole. Therefore, it is the merits and demerits in En Reza's client's case (including in the recusal application) onto which we had to, and will continue to, channel our primary focus. Where we find it necessary to address any aspect of En Reza's conduct, we will do so *as a separate issue*, without equating it with the merits in his client's case.

[49] Lest I be misunderstood, what I said above must not be taken as a licence, or an encouragement, for En Reza (or any counsel for that matter) to behave or, rather, misbehave in any way he likes. The power to regulate its proceedings remains with the board.

To avoid misperception, I must also hasten to add that the drastic change in attitude was noticed in relation to En Reza alone. His co-counsel, Mr Adrian Choong, has remained courteous and decorous throughout the several days of hearing.

C.5 Non-compliance with the board's directions and decisions

[50] At the end of the hearing on 29 September 2015, a decision was made as follows:

> YYP: After hearing parties, the Board finds that Ms Choy's suggestion is the most practical in the circumstances. We would adjourn this matter for mention on the next available date, which will be (19.10.2015 at 2:15 pm), for all parties to revert to the Board in the event they find any material inaccuracy in the notes of proceedings. The Board will then consider the most practical way to check or verify the accuracy of those parts of the notes. That is something for us to decide on (19.10.2015).

[51] On 19 October 2015, Mr Adrian Choong appeared for the planning applicant. En Reza was indisposed, for reason already mentioned. Among other things, the following transpired:

(Note: YYP denotes the Chairman, AC denotes Mr Adrian Choong)

> YYP: Were you here on the last occasion?
>
> AC: Yes.
>
> YYP: We requested someone from your team to identify the parts which need checking.
>
> AC: We have, but the substantive file is with Reza.
>
> YYP: We will consider your request. Did anyone from your team take notes?
>
> AC: Yes.
>
> YYP: Can you send to the Registry within one month (by 19 of November) the notes taken by your team, together with the identified parts of the Board's notes that you request for checking?
>
> AC: Yes.
>
> YYP: Are there a lot of places which need checking?

AC: Not many.

YYP: Might be easier for you to photocopy those pages, and mark the parts you request checking. Then we will consider the request.

At the request of the planning applicant, the matter was then adjourned to 3 December 2015.

[52] From the above, we know that the planning applicant's counsel had already identified the parts of the detailed notes of proceedings that they wished to request to be checked; and that there are not many such parts. The board then directed the planning applicant to submit two things to the board by 19 November 2015, namely: (a) the planning applicant's notes (the notes taken by counsel for the planning applicant during the relevant days of hearing); and (b) photocopied pages of the detailed notes of proceedings that they request to be checked, with the parts to be checked duly identified. *Counsel for the planning applicant ('Mr Choong') agreed to do so.* He did not say that he was not prepared to do so; or that he had to check with his client before deciding whether he would do so. He also did not say that he might or might not do so, treating it as a mere 'request' from the board.

[53] Came 19 November 2015; but the planning applicant had not complied with the aforementioned directions. There was also no communication from its counsel to the registrar, either explaining its non-compliance, or asking for more time to comply. There was, simply, silence.

[54] The matter was fixed for 3 December 2015. The day before that, the planning applicant's solicitors delivered a letter (dated 27 November 2015) to the registrar, stating that 'our client is not agreeable for the counsel notes to be furnished to the board as there is no basis for the board to request the same'. In that letter, they also 'request for the audio recording of the notes of proceedings [sic]'; without mention of the direction for them to first identify the parts which they wish to request to be checked.

[55] On the following day, ie 3 December 2015, En Reza appeared together with Mr Adrian Choong, for the planning applicant. Both of them told the board that the planning applicant refused to comply with both the directions given earlier by the board — ie one concerning production of the planning applicant's notes, and the other regarding identifying the parts of the detailed notes of proceedings which they request to be checked.

[56] En Reza said that he was not aware that those were directions of the board, until that day itself. Mr Adrian Choong at first said the same thing; but he later admitted that the refusal was because his client subsequently changed

its mind:

(Note: YYP denotes the Chairman, RR is En Reza and AC is Mr Adrian Choong)

YYP: You do realize that the Board had made a direction?

RR: I'm not aware, concerning the notes.

YYP: It was very clear. We made it clear to Mr Adrian Choong, in the presence of other counsels.

AC: It was a request.

YYP: Did I not ask Mr Choong how much time he needed to supply his notes? The date was not imposed on him. He agreed with the date. Was your client here during the last occasion?

AC: Yes.

YYP: Did the Board ask you the date by which you would be able to do that?

AC: Yes.

YYP: Say so, if you have changed your mind. I have a clear recollection. It was also recorded, it need be.

Mr Choong, you also said that you could do both of the things on those dates — your notes, and to identify the parts of the notes of proceedings about which you require verification?

AC: Yes, sir.

YYP: And your client was present?

AC: Yes, a representative of my client.

YYP: And later, they changed their instructions to you?

AC: Yes, Dato, before the letter was sent out, Dato.

[57] En Reza gave two reasons why the planning applicant refused to comply with the board's directions. First, he said he could not find any provision to the effect that notes of proceedings taken by counsel should be furnished or produced. Second, he was of the view that the board's directions were wrong; and that both he and his client had the right to refuse to comply with a direction if they regarded the direction to be wrong. The following are some parts of the dialogues with En Reza on that day:

RR: ... We regret to inform that we have actually gone through some provisions, but we could not find any provisions where counsel's notes were asked to be furnished by the tribunal where the accuracy of the words are to be determined in a recusal application.

...

YYP: Are there provisions in the Act or in the rules regarding recusal?

RR: No. That doesn't mean a recusal application cannot be made.

YYP: Similarly, just because there are no express provisions in the Act or the rules relating to a matter in which the Board wishes to issue a direction, it also doesn't mean that the Board cannot issue that direction. Do you agree?

RR: I would agree in the context, ...

YYP: Do you agree that the Board in the course of a hearing or proceeding, can and in fact often does make numerous directions and rulings?

RR: Again I would agree with the general statement.

YYP: Very well. As to whether each and every one of such directions is correct or not is a matter which the parties can submit on, when the ruling is made or is about to be made, agree?

RR: Yes.

YYP: And if a party who feels that a particular direction or ruling is wrong, he of course can challenge that direction or ruling, either on appeal as one of the grounds, or in the case of this Board, on judicial review. Agree?

RR: Agree.

YYP: However, meanwhile the ruling has to be abided by, do you agree?

RR: I'm sorry, I don't.

YYP: Which means that, in your view, if a judge makes a ruling that a question should not be asked — instead of taking it to a higher court later to say that the judge is wrong and therefore his ruling affected the case — you are saying that, as counsel, you have a right, other than the right of bringing it to a higher court and challenging that ruling and saying that the ruling is wrong and has therefore affected the outcome of the case, you also have the right to defy the ruling, insist that the same question (which has been ruled should not be asked) is to be asked, and also insist that it be answered?

RR: That is not so.

YYP: What is your position then?

RR: The analogy is an analogy which is premised in a court of law, whereby rules of evidence, rules of conduct and power of contempt are vested within the court. On the other hand, the pretext upon the ruling which we are speaking about would be a ruling which is made by a tribunal or a board which is not vested with the similar powers as vested in a high court judge. Therefore I would adopt the position that if there was any rulings and/or directions which affect the vested rights of the parties appearing before the tribunal, then the party may elect to do 2 things: (1) appeal; or (2) ask for stay for the

> direction from the higher court or in the interim also ask for a stay in the tribunal, and henceforth refuse to comply with the directions until it be affirmed by the high court. ...

[58] The proposition that 'if there is no *specific* provision for something, then it cannot or should not be done', is *jejune* to the extreme. If it were a valid argument, then the recusal application itself ought to be dismissed in limine, since there is no specific provision for it in the Act or in the relevant rules. The planning applicant's counsel would also not have any business in requesting for audio recording, because there is no provision for it.

[59] It is trite that every tribunal or decision-making body is entitled to regulate its own proceedings, subject only to any express limitations placed on it by statute or by any applicable rules. No tribunal or decision-making body will be able to adequately carry out its functions to deal with the infinitely varied situations in life, if every move it makes must be based on an express, written, and specific provision.

[60] In any case, s 40(1) of the Interpretation Acts 1948 and 1967 stipulates:

> Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

Section 40(2)(c) in turn provides that:

> where a power is conferred on any person to direct, order or require any act or thing to be done, there shall be deemed to be imposed on any person to whom a direction, order or requisition is given in pursuance of the power a duty to comply therewith.

[61] Moreover, I do not think En Reza is correct when he says that there are no provisions for the board to make a direction, in the course of the hearing of an appeal, requiring the production of a document such as the planning applicant's notes. Section 36(10) of the Act states:

> In respect of an appeal before it, the Appeal Board —
>
> ...
>
> (d) may compel the production and delivery of any document that it considers relevant or material to the appeal;
>
> ...
>
> (g) may make any order whether or not provided for by, and not inconsistent with, this Act.

And s 36(11) of the Act provides that: '... every person required by the Appeal

Board to produce or deliver any document to the Appeal Board ... is legally bound to so produce or deliver the document'.

[62] I do not think it can be in doubt that the board has the power to make interlocutory decisions, rulings and directions. That power is both conferred by statutes, and derived from common law. Policy reasons will lead us to the same inevitable conclusion. An adjudicator will not be able to perform his duty, if he has no power to regulate proceedings, and to make decisions, rulings and directions (including interlocutory ones) when regulating its proceedings.

[63] The second reason offered by the planning applicant is equally hollow. En Reza takes the position that, each time an adjudicator or a tribunal (such as the board) makes a ruling or issues a direction which a party thinks is wrong, that party will be entitled to seek a stay of the proceedings; while it goes and applies for a judicial review of that ruling or direction ('interlocutory judicial review'), at the High Court. Meanwhile, so says En Reza, he and his client are *entitled* not to comply with the ruling or direction, 'until it [is] affirmed by the High Court'.

[64] I do not know if En Reza had thought through his stand. For if he were right, there can be as many interlocutory judicial reviews as there are rulings or directions which one party or another dislikes or disagrees with; before the hearing of a planning appeal at this board can even be completed. The appeal process designed by the Act can easily be thrown into disarray by a litigious person.

And if En Reza were right, then the appellant in this appeal is entitled to do likewise, by seeking an interlocutory judicial review whenever she finds a ruling or direction which she disputes; and by doing so delay the completion of the hearing of her appeal by months or years. In this way (should the appellant be so inclined), even if the eventual outcome is in the planning applicant's favour, the long delay would have frustrated the planning applicant considerably.

Again, if En Reza were right, there will be more than a few instances where developers and planning applicants will in reality be forced to grudgingly succumb to the demands of neighbour objectors; because the former cannot afford to wait for years in order to know the final outcome of the latter's appeal to this board, if a party is entitled and minded to mount multiple *interlocutory* challenges against rulings and directions.

[65] The filing of an interlocutory judicial review (and the leave-application preceding it), even where permitted, surely cannot operate as an *automatic* stay of the proceedings. But, in practical terms, in what way could the continuation of the proceedings be conducted?

If En Reza were correct that the party seeking an interlocutory judicial review ('the disputing party') is entitled to refuse to comply with the ruling or direction until it is affirmed by the High Court; then *in effect* any continuation of the hearing in the meantime will be conducted as though the ruling or direction is non-existent or overturned — to wit, in a way that the disputing party wants and dictates, and not in a way that the board sees fit or has decided. That surely cannot be right. It will be tantamount to allowing a party to control the processes of a hearing. It amounts to a contorted form of a delegation or abdication of the exercise of judicial responsibility and discretion — something that a judge or adjudicator must never do — see *Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama* [1997] 3 MLJ 805; [1997] 4 AMR 4235.

[66] Fortunately, to my mind, En Reza is clearly wrong. A party or its counsel is not entitled to choose to abide by only those interlocutory rulings and directions that it agrees with. If it were otherwise, proceedings will be rendered unmanageable.

A final decision of this board, on an appeal lodged under the Act, is of course subject to judicial review by the High Court. But that is to be pursued only after the conclusion of the hearing of an appeal, and after a *final, substantive decision* of the board has been reached relating to it. Save in very rare and exceptional circumstances (about which I shall shortly explain), an interlocutory judicial review would, in my view, not be entertained; especially one regarding a procedural matter. Good reasons for saying so are found in the discussions above, and in the illustrations given.

[67] Mason CJ in *Australian Broadcasting Tribunal v Bond and Others* (1990) 94 ALR 11 at pp 23–24 discussed, among other things, the policy considerations and policy arguments relating to the ambit of 'decisions' that may be subject to judicial review. The learned Chief Justice had these to say:

> (a) To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process. (at p 23)
>
> (b) A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision ... (at p 23)
>
> (c) Another essential quality of a reviewable decision is that it be a substantive determination. (at p 24)

Mason CJ warned of the 'fragmentation of the processes of administrative decision-making', and the risking of 'the efficiency of the administrative

process'. I am sure judicial and quasi-judicial decision-making processes will deserve no less protection from fragmentation.

[68] The judgment of the House of Lords in *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 contains passages which are highly instructive on why interlocutory decisions and rulings (with rare exceptions) ought to be obeyed and complied with:

> (a) ... in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. *It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty.* Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. per Lord Roskill at p 488f–g. (Emphasis added.)
>
> (b) ... the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong. ... *the control of the proceedings rests with the judge and not with the plaintiffs.* ... The only legitimate expectation of any plaintiff is to receive justice. *Justice can only be achieved by assisting the judge and accepting his rulings.* per Lord Templeman at p 493b–g. (Emphasis added.)

[69] From the passages quoted above, the following are clear:

(a) a judge or adjudicator has the right to regulate and control proceedings, including by issuing interlocutory decisions, rulings and directions. Among other things, a judge or adjudicator has control over time-management, such as in choosing a mode of proceeding that saves time;

(b) a party or counsel is entitled to argue for or against the making, or the intended making, of an interlocutory decision, ruling or direction; and to persuade the judge or adjudicator either to make the same, or not to do so;

(c) once an interlocutory decision, ruling or direction is made, however, a party and its counsel have the *duty* to comply with the same; because the justice-process will be ill-served by their defiance;

(d) no party or counsel should, consciously or otherwise, attempt to directly or indirectly dictate or control how a proceeding is to be conducted;

(e) in a subsequent appeal or judicial review, a party who disagreed but complied with an interlocutory decision, ruling or directive is entitled to argue that the same was wrongly made or issued; and that as a result the judge's or adjudicator's final, substantive decision is inseparably tainted by the error, and ought to be overturned or modified; and

(f) when a judge or adjudicator makes a ruling or direction, it is done *for the benefit of the proceeding as a whole*. Some rulings may seem to 'benefit' one party; and some another. But all interlocutory orders, rulings and directions will bind all parties. They also bind the court or tribunal itself — see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at p 66; [1997] 2 CLJ 104 at p 114d. If the court or tribunal should allow its rulings and directions to be ignored, it will do a grave disservice not only to itself, and to the justice process, but also to one or more of the parties involved.

[70] Most general principles in law will have exceptions. In the context of prompt compliance with rulings, the only exception that could rarely arise, which I had alluded to in para 66 above, is when a judge or adjudicator makes a clearly or obviously ridiculous, outrageous or absurd interlocutory decision, ruling or direction. For example, if a counsel were to be directed to make his submissions standing on one foot, or a witness were to be directed to give his evidence in sentences that must rhyme with each other; such a ruling or direction will be instantly recognised as absurd, or, as the House of Lords has put it, 'plainly wrong', meaning that it is wrong *beyond argument*. The exception can only apply if the ruling or direction is one which every reasonable and informed person upon hearing it would exclaim, 'of course that cannot be right'! The exception is not available to a party just because it (or its counsel) takes the view that a ruling or direction is wrong; or where a ruling or direction is one which may be arguably wrong.

[71] Can the two directions given by the board be in any way termed plainly wrong, unarguably wrong, or obviously wrong? I do not think so. On the contrary, I think they are right, if not plainly right.

The first direction — for the planning applicant's notes to be furnished — is made because those notes are the only possible source from which the planning applicant could have extracted the attributed phrases and sentences that were allegedly spoken, and that are now used by it to construe bias or prejudgment. In fact, the planning applicant's notes ought to have been exhibited in the recusal affidavit in the first place. As they have not been produced, surely it is not wrong for the board hearing the recusal application to want to inquire into the basis of the application, and for that purpose to require a party to furnish the source-document.

[72] At one point during the proceedings, counsel for the planning applicant briefly mentioned that their notes may have some comments written at the side. I made it clear that the planning applicant was not asked to furnish the notes taken down by its counsel in the original hand written form. The planning applicant could easily type out its counsel's handwritten notes, and in doing so leave out the remarks or comments (if any) which the counsel might have written.

[73] The second direction is likewise clearly reasonable and desirable. Most parts of the proceedings are not relevant to the hearing of the recusal application. Mr Choong recognised this. Out of the parts that are or that may be relevant, Mr Choong had already informed the board that they would not be requesting many places to be checked:

> YYP: ...
>
> The second direction is that, when you make a request for a recording, you have to identify those parts that you wish to verify, then we will consider the request. Are you going to comply with that, or again not?
>
> AC: I am not prepared to do that, Dato. It is my clients' instructions.
>
> YYP: And the reason?
>
> AC: As my client's instructions, as the notes that was provided to us actually contain more than what we have captured. Therefore we need the audio recording if that was what was actually said, that was all we are asking, Dato.
>
> YYP: Mr Choong, out of those 100 pages or so, is every page relevant to the recusal application?
>
> AC: No.
>
> YYP: So, it is a simple thing that we are asking — to identify the relevant parts! So, do you maintain your answer?
>
> AC: We do maintain that, unfortunately. It's my client's instructions.
>
> YYP: Are you saying that, when a counsel takes a certain stand, and the Board wants to understand it, and asks for the reason; the counsel can always say that 'I'm sorry, that is the instruction from my client, and I can't explain the reason for taking that stand'?
>
> AC: I don't know.
>
> YYP: So, you are not going to comply with both the directions, and yet you want your recusal application to continue to be heard?
>
> AC: Yes.

[74] The direction is for them to do a very simple thing — to identify the parts which they request to be checked. Surely such a direction cannot be

described as plainly wrong. In fact, it is plainly right; so as to save invaluable time, and to assist or enable the board to decide how best and most efficiently to continue with the proceedings. It is difficult to think of any good reason why the planning applicant should refuse to comply. When asked, counsel for the planning applicant did not explain why he refused to follow a simple direction, except to say that it was his client's instructions that he should so refuse. That is hardly an explanation; particularly when the counsel's flat refusal came only after he had, about a month earlier, already agreed to comply.

C.6 Aiding justice, or fearing punishment?

[75] Perhaps (though this is not perfectly clear) the planning applicant's inexplicable conduct is connected with an argument put forward by its learned counsel — an argument which I find bizarre.

En Reza appears to say that he would not be behaving in the same way — ie in refusing to comply with an interlocutory ruling or direction — if he were in a court; because a judge possesses the power to commit a person for contempt, for non-compliance. The board, he says, has no such power. Therefore the board cannot draw an analogy with the situation that pertains to the court. This was what En Reza said:

> RR: The analogy is an analogy which is premised in a court of law, whereby rules of evidence, rules of conduct and *power of contempt are vested within the court*. On the other hand, the pretext upon the ruling which we are speaking about would be a ruling which is made by *a tribunal or a board which is not vested with the similar powers as vested in a high court judge*. (Emphasis added.)

Indirectly, En Reza is saying that the board is powerless to do anything, if its ruling or direction is ignored. Therefore he and his client are quite at ease in refusing to comply with the board's directions.

[76] I do not think it will be an exaggeration to say that most counsel will feel highly embarrassed to suggest such an argument — because it bluntly reveals its proponent's immaturity of thought and conduct, unprofessionalism, misguidance, and a severe lack of understanding of the purpose and import of legal, judicial and quasi-judicial processes.

[77] It takes a poor advocate for justice to propose that the rationale for a counsel's compliance with a judge's ruling or direction is the fear of the punishment of contempt; and that, if that fear is absent, then a counsel should feel free to disobey a ruling or direction if he disagrees with it, or if his client instructs him to do so!

[78] The true reason for compliance has nothing to do with contempt power, or with the fear of its employment. A counsel is required to comply with a judge's or an adjudicator's rulings and directions, *because justice demands and requires it* — since compliance will assist a judge or an adjudicator in carrying out his duty (as the House of Lords has explained in *Ashmore v Corp of Llyod's*); and disobedience on the other hand will render a judge's or an adjudicator's task chaotic and impossible to perform.

[79] To instantly appreciate the importance of compliance with interlocutory rulings and directions; all one needs to do is to picture a judge or an adjudicator conducting a trial or a hearing; and his rulings are regularly disobeyed by one party or another. If the judge or adjudicator rules something to be irrelevant, one party will nevertheless insist that it is relevant, and demand that it be admitted and referred to, saying that the judge's or adjudicator's ruling is wrong. Or, if a judge or adjudicator allows a question to be asked of a witness, a party will then tell the witness not to answer it (until the ruling is upheld by a higher court), on the ground that the question is wrongly allowed. If that is permissible, a hearing can be constantly disrupted, or put to a halt; and the judge or adjudicator will lose control of the proceeding. Disobedience of rulings and directions will turn a proceeding into a mockery.

[80] The issue of contempt-power does not at all arise here. With or without contempt-power, the purpose and processes of this board deserve the same kind of facilitation as does a court proceeding. Otherwise, the functions of this board will not be accomplished. For anyone having a genuine concern for the solemn aim and process of justice; a suggestion that, because this board has no contempt-power, therefore it is unlike the High Court, and parties may feel free to disobey its interlocutory rulings and directions, and by so doing plunge its proceedings into disarray, is a contention not worth even the meekest utterance.

D. AN EXCURSUS: IS THE BOARD HELPLESS WHEN ENCOUNTERING CONTEMPT?

[81] As an excursus, and lest the reasoning in these grounds of decision is misunderstood, I wish to add that I do not agree with the planning applicant's counsel's contention that this board has no power at all to deal with a situation of, or similar to, contempt. If counsel for the planning applicant is correct, then members of the board will have to fold their arms and look stoic, if anyone appearing before them should commit an act of contempt. And if a shoe is thrown at a panel member, all he or she can do is duck.

That cannot be right.

[82] The board being a creature of statute, and not a court of inherent jurisdiction; I am inclined to agree that it likely does not have any power to impose a fine on a contemnor, let alone imprisonment. However, there are other ways of dealing with acts of contempt; such as (but not limited to) disallowing a contemnor's further participation in the proceedings, until his contempt is purged. Natural justice requires that an affected person be given a reasonable and adequate opportunity to be heard. Natural justice does not provide an affected person with a licence to abuse that opportunity, commit contempt, and at the same time insist that he must continue to be heard.

[83] However, these are not matters that I have to presently decide. They are best left for another occasion, should the need ever arise; and when the board may be assisted by arguments on the issues concerned. Their brief mention here is so that I will not be misunderstood as having agreed with the view that the board has no power whatsoever to deal with acts of contempt. In all these years, the board has no reason to have to contemplate this issue; and I hope the need will not arise in the future too.

E. SUMMARY OF FINDINGS AND ANALYSIS

[84] I am fully conscious of the fact that both the hearing of the recusal application and the hearing of the appeal have not been concluded. Obviously, no final decision has been made regarding either of them. It should also go without saying that the findings, views and reasoning expressed in the meantime are interlocutory in nature, arrived at in order to be able to reach a reasoned decision on interim matters. Parties are in no way precluded, as the proceedings continue, from adducing evidence or materials, and from making submissions on the law, to persuade the board to come to a different view when making its final decision.

[85] Seen in that light, I will set out below a summary of the board's findings and analysis at this stage, relating to the planning applicant's non-compliance with the board's directions:

(a) the planning applicant is not a party named in this appeal (and in the connected appeals). But the board recognises that it is an affected party, and that it should be given full opportunity to be heard; as long as it does not abuse the opportunity;

(b) the planning applicant's first witness is a person having no personal knowledge of matters which occurred at the relevant times. She also has not read any company documents from which she could have derived some indirect knowledge. On 24 July 2015, the planning applicant

realised the mistake, and requested that no weight be given to her testimony. The planning applicant also requested an adjournment. The board granted both its requests;

(c) it was after having its requests accommodated that the planning applicant, without any previous indication, filed a recusal application against all three members of the panel, on the purported basis that certain things were alleged to have been said during three previous days of hearing;

(d) curiously, the recusal affidavit (in support of the recusal application) was affirmed by someone who was never present in any of the three days of hearing referred to in it, someone who therefore does not have personal knowledge. It is curious, because this was done soon after the earlier episode where the planning applicant requested to have its witness's (Ms Teh's) testimony disregarded precisely because of absence of personal knowledge;

(e) context is all important, in a recusal application — *Re Singh Kalpanath* [1992] 2 SLR 639 at p 666 and as admitted by Mr Ow himself. Despite the lack of personal knowledge, Mr Ow in his affidavit sets out seven purported 'direct quotes' from the proceedings which took place on 23 July 2015 and 24 July 2015. Before doing so, neither Mr Ow nor the planning applicant took any step to check the accuracy and the *contexts* of those purported quotes;

(f) for the planning applicant, the only possible source (of the purported quotes used by Mr Ow) was from the planning applicant's notes, ie notes taken down by its counsel during the hearing. Those notes are the source of Mr Ow's depositions. But he did not produce or exhibit them. Without them, the planning applicant cannot show any contexts. They ought to be exhibited;

(g) it could be suggested that, if an applicant or deponent does not disclose the source of information, then its application should simply be dismissed. That would be the easiest to do. But that might not be the most appropriate thing to do, with regard to a recusal application. This is because, in a recusal application, allegations are usually made not against another party, but against the judge or adjudicator. Dismissing such an application *in limine*, even if on proper grounds, could fuel the wrong impression of the process. It is usually better, for everyone involved, to get to the bottom of things, when a recusal application is made;

(h) the board's audio recording is not a requirement. It is done as an extra measure, solely to have a backup means of verification, if an occasional need should arise in respect of a specific and materially disputed part or

parts of what had transpired. The need to call upon the same has to be decided by the Board on a case-to-case basis;

(i) the planning applicant's counsel had already identified the parts in the detailed notes of proceedings that they wished to request to be checked. Mr Choong informed the board that there are not many such parts. There is no good reason for the planning applicant to refuse to indicate to the board and to the other parties those parts it has already identified;

(j) the two reasons offered by the planning applicant for defying the board's directions do not hold any water, as already explained in paras 57–80 above;

(k) proceedings will turn into a chaos, if a party or its counsel is entitled to choose to obey only those rulings and directions that it agrees with. It is the duty of counsel to abide by interlocutory decisions, rulings and directions — see *Ashmore v Corp of Llyod's* [1992] 2 All ER 486. Justice will be sabotaged, if a judge or adjudicator allows the control of proceedings to be handed over to a party or to its counsel. A judge or adjudicator who does that abdicates his judicial responsibility and discretion;

(l) a judicial review of the board's decision is always available to the parties; after the conclusion of the hearing of an appeal, and after a final, substantive decision of the board has been reached. Interlocutory judicial reviews (ie reviews of interlocutory rulings and directions) are normally not permissible; for they will result in a fragmentation of the process of decision-making — see *Australian Broadcasting Tribunal v Bond and Others* (1990) 94 ALR 11 at pp 23–24; and

(m) an interlocutory order, ruling or direction is made for the benefit of the proceeding as a whole. It needs to be complied with. It binds all parties, as well as the court or tribunal itself — see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at p 66; [1997] 2 CLJ 104 at p 114d. If the court or tribunal should allow its rulings and directions to be ignored, it will do a grave disservice not only to itself and to the justice process, but also to one or more of the parties involved. It is not something that this board should, or would, do.

F. THE BOARD'S DECISION

[86] The board (by unanimity of the panel members) decides as follows:

(a) that the planning applicant do, on or before 31 March 2016, file four copies of an affidavit exhibiting a true copy of the planning applicant's notes (ie the notes taken by its counsel, of what were said or what had transpired, during the hearing on 26 June 2015, 23 July 2015 and 24 July 2015). A copy of the affidavit shall also be served on the solicitors

for the appellant and the respondent respectively (and on the solicitors for the appellants in the connected cases);

(b) that, subject to and after its compliance with the order made in sub-para (a) above; if the planning applicant shall wish to request the board to check the accuracy of any parts of the detailed notes of proceedings for 26 June 2015, 23 July 2015 and/or 24 July 2015, the planning applicant shall identify the parts in the said notes that it requests to be checked, and shall submit to the board a copy of those identified parts clearly indicated or highlighted, on or before 15 April 2016. The board will then decide on such a request; and, if granted, on the manner of carrying out the checking of those identified parts of the said notes; and

(c) that the recusal application will be scheduled for continuation of hearing, after the planning applicant has complied with the order made in sub-para (a) above; and also (if applicable) with the order made in sub-para (b) above.

Order accordingly.

Reported by Kohila Nesan